



(512) 481-8400

*Catherine.robb@sedgwicklaw.com*

March 13, 2012

*Via Facsimile (713) 587-1280 and Certified Mail*

Richard Gomez  
Vice President Operations  
TVMax Inc.  
10300 Westoffice Drive, Suite 200  
Houston, Texas 77042

Re: Notice to Cease and Desist Retransmission of KRIV and KTXH signals

Dear Mr. Gomez:

We have been retained by Fox Television Stations, Inc. ("Licensee"), licensee of KRIV and KTXH ("Stations"), to represent them in their claims against TVMax Inc. ("TVMax"). Please direct all further communications concerning this matter to us.

TVMax is currently blatantly infringing upon the copyright of Licensee. This is clear from the fact that the previous retransmission agreement between Licensee and TVMax expired on December 31, 2011, yet TVMax has continued to carry KRIV and KTXH without a retransmission agreement since that time — for almost two and a half months. As recently as March 5, 2012, Patricia K. Russell, Administrative VP at TVMax, confirmed that TVMax is still carrying KRIV and KTXH in Houston.

Neither the Copyright Act nor the expired retransmission agreement between Licensee and TVMax give TVMax the right to continue to transmit the signals from KRIV and KTXH. Licensee first began discussing with you in September 2011 proposed terms of carriage of the Stations' signals. Since that time, Licensee has repeatedly attempted to contact you to further discuss the matter, but you have refused to substantively respond to Licensee's call, letters, and emails regarding this issue and, as of December 31, 2011, there is currently no retransmission agreement in place. On December 20, 2011, Joseph Di Scipio, Vice President, Legal and FCC Compliance for Licensee, sent you a letter regarding this matter, advising you that TVMax was required to cease retransmission of the Stations' signals as of December 31, 2011 at 11:59 p.m. Despite this demand, you have refused to do so, in blatant disregard of the law.

Given the foregoing, liability is not in question. The only issue to be decided by the court, should a lawsuit become necessary, is the amount of damages. As Mr. Di Scipio informed you in the December 2011 Letter, if TVMax continued to retransmit the signals of the Stations after December 31, 2011, Licensee would be entitled to pursue appropriate damages under Sections 504-505 of the Copyright Act, which allows a victim of willful copyright infringement to recover, at its election: (a) all actual damages or (b) statutory damages in the amount of \$150,000 per work, as well as costs and attorneys' fees. Since you were forewarned about the Act's application and still continued to retransmit the signals of the Stations, there is no doubt that a court would find that the violation by TVMax was willful. Furthermore, because

Richard Gomez  
March 13, 2012  
Page 2

TVMax continues to retransmit the signals of KRIV and KTXH after the expiration of the agreement, Licensee may also refer this matter to the FCC for violation of the Communications Act.

In accordance with the foregoing, Licensee demands that you immediately cease and desist retransmitting the signals of KRIV and KTXH. If TVMax does not cease retransmitting the signals of KRIV and KTXH by 5:00 p.m. on March 14, 2012, Licensee will have no choice but to move to protect its rights to the fullest extent under the law.

You have been previously notified that any post-December 31, 2011 retransmission of the signals of KRIV and KTXH are unauthorized and should not occur; therefore, your continued violation is willful and egregious. As such, Licensee will be able to recoup from you and your company exemplary and statutory damages for willful infringement plus reimbursement of its attorneys' fees.

This letter does not purport to set forth an exhaustive statement of all facts relevant to the matters complained of, nor shall any proposal or statement made in this letter be construed as a waiver of any right or remedy presently available to our clients, all such rights are being hereby expressly reserved.

We look forward to your swift confirmation that the signals have been pulled down.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Catherine L. Robb". The signature is fluid and cursive, with the first name being the most prominent.

Catherine L. Robb  
Sedgwick, LLP

CLR/dej

**ATTACHMENT 5**

# TVMAX dba WAVEVISION

March 16, 2012

Catherine L. Robb  
Sedgwick, LLP  
919 Congress Avenue  
Suite 1250  
Austin, TX 78701-3656

**RECEIVED**

Mar 19 2012

Re: KRIV & KTXH

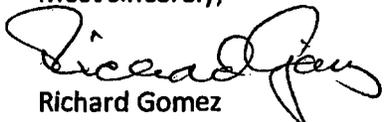
Dear Ms. Robb:

We have received your recent correspondence regarding payment for retransmission of your local broadcast signal.

Please allow this letter to serve as notification of our full compliance with the requirements of 47CFR 76.64(e). As such, the retransmission consent requirements are not applicable to Wavevision.

We look forward to our continued relationship with you.

Most sincerely,



Richard Gomez  
Vice President and General Manager

**ATTACHMENT 6**

*(512) 481-8400**Catherine.robbs@sedgwicklaw.com*

March 22, 2012

*Via* Facsimile (713) 587-1280 and Certified Mail

Richard Gomez  
Vice President Operations  
TVMax Inc.  
10300 Westoffice Drive, Suite 200  
Houston, Texas 77042

Re: Notice to Cease and Desist Retransmission of KRIV and KTXH signals

Dear Mr. Gomez:

We are in receipt of your letter dated March 16, 2012 in which you claim that TVMax d/b/a Wavevision ("TVMax") is in "full compliance with the requirements of 47CFR 76.64(e)" and that the "retransmission consent requirements are not applicable to Wavevision." We strenuously disagree with your assertion that TVMax is in compliance with 47 C.F.R. § 76.64(e) and exempt from the retransmission consent requirements. As you are aware, in order to qualify for the exemption under 47 C.F.R. § 76.64(e), TV Max must:

1. Receive the stations' signals by master antenna television reception facilities or by direct over-the-air reception in conjunction with MVPD service; and
2. Make the reception of the stations' signals available without charge and at the subscriber's option; and either,
3.
  - (a) The antenna facility used for the reception of the stations' signals must be owned by the subscriber or the building owner; or
  - (b) The antenna facility must be under the control and available for purchase by the subscriber or the building owner upon termination of service.

We believe that TV Max is receiving KRIV/KTXH signals off-air at a specific headend and distributing those signals to a number of multiple dwelling units via a fiber ring. Such a configuration would not meet the test in either prong 3(a) or 3(b) above. We also have no reason to think that TVMax has satisfied the first two prongs, which must also be met. Therefore, TVMax does not satisfy the requirements for exemption. If you believe that there is information not in our possession that would demonstrate that TVMax does satisfy all of the requirements for exemption, please explain to us in detail your reasons for so believing, so that we may evaluate them. If not, we expect that TVMax will immediately cease retransmission of the KRIV and KTXH signals.

Richard Gomez  
March 22, 2012  
Page 2

If we do not hear from you within 2 business days (by close of business on Monday, March 26<sup>th</sup>) and receive either an adequate explanation for why TVMax is exempt or proof that you have ceased transmission of the signals, we will be filing a complaint with the FCC.

As you know, the FCC recently issued twin Notices of Apparently Liability ("NAL") to Bailey Cable TV, Inc. for carrying WVLA-TV and WGMB-TV in Baton Rouge without WVLA-TV's and WGMB-TV's respective consents. (Copies of the two NALs are attached). In those cases, the FCC stated that the base forfeiture for each violation of the cable broadcast carriage rules is \$7,500. In both situations, and in TVMax's, each day of carriage without consent is a violation. For Bailey, the forfeiture amount was, as to each station, \$7,500 x 34 days for a total base forfeiture of \$255,000 per NAL. The FCC reduced each forfeiture to \$15,000 per NAL (for a total of \$30,000 for the two NALs) due to financial information Bailey submitted to the FCC, but did state "We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations. Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Bailey's financial circumstances."

We look forward to your swift confirmation that you have ceased retransmission of the signals or a prompt, thorough, and adequate explanation for why TVMax is exempt – no later than close of business on Monday, March 26<sup>th</sup>.

Respectfully yours,



Catherine L. Robb  
Sedgwick, LLP

CLR/dej

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Bailey Cable TV, Inc.	)	MB Docket No. 12-35
	)	CSR No. 8585-C
	)	NAL/Acct. No.: MB-201241410024
	)	FRN: 0011409034

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: March 16, 2012

Released: March 16, 2012

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability For Forfeiture (“NAL”), we find that Bailey Cable TV, Inc. (“Bailey”) apparently willfully and repeatedly violated Section 325 of the Communications Act of 1934, as amended (the “Act”), and Section 76.64 of the Commission’s rules, by retransmitting the signal of a broadcasting station without “the express authority” of the originating station.<sup>1</sup> Based upon our review of the facts, we find Bailey apparently liable for a monetary forfeiture in the amount of fifteen thousand dollars (\$15,000).

**II. BACKGROUND**

2. Knight Broadcasting of Baton Rouge License Corp. (“White Knight”) is the licensee of full-power television station WVLA-TV, Baton Rouge, Louisiana. White Knight filed a complaint with the Commission, alleging that Bailey retransmitted without consent the signal of WVLA-TV on its cable system serving St. Francisville, Louisiana; Angola, Louisiana; and certain unincorporated areas within West Feliciana Parish, Louisiana (the “Communities”).<sup>2</sup>

3. Bailey’s cable system serving the Communities is a multichannel video programming distributor (“MVPD”), and WVLA-TV is a broadcasting station within the Baton Rouge Designated Market Area (“DMA”) served by Bailey.<sup>3</sup> For the 2012-2014 carriage cycle, for the Bailey cable system serving the Communities, White Knight elected retransmission consent for WVLA-TV.<sup>4</sup> Although Bailey’s retransmission consent agreement with White Knight expired on December 31, 2011, Bailey

<sup>1</sup> 47 U.S.C. § 325(b)(1)(A); 47 C.F.R. § 76.64(a).

<sup>2</sup> See Enforcement Complaint Concerning WVLA-TV, Baton Rouge, Louisiana (dated Jan. 25, 2012) (“WVLA-TV Complaint”). Concurrently with this NAL, we are issuing a Notice of Apparent Liability For Forfeiture pertaining to a similar complaint filed by Communications Corporation of America (“ComCorp”), the parent company of the licensee of full-power television station WGMB-TV, Baton Rouge, Louisiana, against Bailey. See Enforcement Complaint Concerning WGMB-TV, Baton Rouge, Louisiana (dated Jan. 23, 2012) (“WGMB-TV Complaint”). Bailey was formerly known as Audubon Cablevision. See WVLA-TV Complaint at 1.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 2-3 and Ex. A.

continued carrying WVLA-TV despite the absence of an extension or renewal agreement.<sup>5</sup> White Knight informed Bailey, both before and after the expiration of the retransmission consent agreement, that Bailey was not permitted to retransmit WVLA-TV once the agreement expired.<sup>6</sup> White Knight seeks an order directing Bailey to comply with the law and imposing appropriate sanctions for its knowing, deliberate, and continuing violations.<sup>7</sup>

4. In response, Bailey does not refute that it retransmitted WVLA-TV without express, written consent.<sup>8</sup> Rather, Bailey argues that it faced a “dramatic increase” in requested retransmission consent fees, and states that it receives the signal by antenna rather than satellite or the Internet.<sup>9</sup> Bailey claims that White Knight is “using [the Commission] as a tool to negotiate a dramatic increase in rates” and it requests that the Commission require the fair negotiation of a reasonable rate.<sup>10</sup> On February 3, 2012, following a telephone conference with Commission staff and the parties, Bailey and White Knight executed an agreement extending the term of their retransmission consent agreement.<sup>11</sup>

### III. DISCUSSION

5. As described below, we conclude that Bailey is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000) for its apparent willful and repeated retransmission of WVLA-TV’s signal without the express authority of the originating station. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>12</sup> Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the

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<sup>5</sup> *Id.* at 3. White Knight claims that it “made every effort to extend the Agreement with Bailey, but Bailey refused to engage in good faith negotiations and ignored repeated entreaties by White Knight to discuss the renewal of the Agreement on mutually acceptable terms.” *Id.*

<sup>6</sup> *Id.* at 3-4. White Knight alleges that its designated negotiator contacted Bailey on December 30, 2011, “and advised it that at midnight on December 31, 2011, the Agreement would expire and Bailey would no longer have authority to retransmit the programming for WVLA-TV.” *Id.* On January 3, 2012, White Knight faxed and e-mailed Bailey a letter stating that its continuing carriage of WVLA-TV was in violation of federal law. *Id.* at 4 and Ex. C.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Bailey Cable TV, Inc. Answer to Enforcement Complaint Concerning WVLA-TV, Baton Rouge, Louisiana (dated Jan. 30, 2012) (“Bailey Answer”). Bailey informed the Commission that it did not intend to file a separate answer to the WGMB-TV Complaint, and that the same arguments would apply. During a telephone conference with Commission staff, ComCorp and White Knight on February 3, 2012, Bailey made the same arguments with regard to both stations. Accordingly, for purposes of the separate *NAL* involving WGMB-TV, we will treat the Bailey Answer as pertaining to the WGMB-TV Complaint as well as the WVLA-TV Complaint.

<sup>9</sup> *Id.* at 1. Bailey also claims that it erroneously received a contract for the Hartford-New Haven area that covered all broadcast networks. *See id.* at 1 and Ex. A. Given that the contract clearly labeled two fictitious stations in the Hartford-New Haven DMA as examples, this argument fails. *See id.* at Ex. A.

<sup>10</sup> *See id.* at 1.

<sup>11</sup> *See* Letter from Stuart Shorenstein, Counsel to Knight Broadcasting of Baton Rouge License Corp., to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau, at 1 (Feb. 28, 2012). Bailey erroneously indicated that the date of the telephone conference was February 2, 2012. *See* Letter from David A. Bailey, Bailey Cable TV, Inc., to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau (Feb. 27, 2012).

<sup>12</sup> *See* 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

law.<sup>13</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>14</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>15</sup> The Commission may also assess a forfeiture for violations that are merely repeated and not willful.<sup>16</sup> "Repeated" means that the act was committed or omitted more than once or lasts more than one day.<sup>17</sup> In order to impose a forfeiture, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed or why it should be reduced and must include a detailed factual statement and pertinent documents and affidavits as support.<sup>18</sup> The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.<sup>19</sup>

6. Section 325 of the Act requires cable systems and other MVPDs to obtain "the express authority of the originating station" to retransmit a broadcasting station's signal.<sup>20</sup> This requirement is codified in Section 76.64 of the Commission's rules, which further requires retransmission consent agreements to be in writing and to "specify the extent of the consent being granted."<sup>21</sup> The Commission previously stated that if an MVPD retransmits a television signal without consent, Commission intervention would be consistent with precedent and "properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture."<sup>22</sup>

7. We find that Bailey apparently violated Section 325 of the Act and Section 76.64 of the Commission's rules by retransmitting WVLA-TV's signal without the required consent. Bailey does not dispute White Knight's allegations that it retransmitted WVLA-TV's signal despite the expiration of the retransmission consent agreement and the failure to enter into an extension or renewal agreement.<sup>23</sup> Bailey objects to the increase in the retransmission consent fees requested by White Knight,<sup>24</sup> but such an increase does not justify an MVPD's retransmission of a broadcasting station's signal without the originating station's express authority. We also find irrelevant to this matter Bailey's statement that it

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<sup>13</sup> 47 U.S.C. § 312(f)(1).

<sup>14</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>15</sup> See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>16</sup> See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) ("*Callais Cablevision, Inc.*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

<sup>17</sup> *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

<sup>18</sup> See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>19</sup> See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

<sup>20</sup> 47 U.S.C. § 325(b)(1)(A). Although there are certain exceptions to this requirement, including for local commercial stations that have elected to assert their mandatory carriage rights, no exceptions apply to the present situation. See WVLA-TV Complaint at 2 n. 1; 47 U.S.C. §§ 325(b)(1)(B), 534(b).

<sup>21</sup> 47 C.F.R. § 76.64(a), (j).

<sup>22</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3005, ¶ 175 (1993).

<sup>23</sup> Bailey Answer.

<sup>24</sup> See *id.* at 1.

receives the signal "free over the air to antenna receivers."<sup>25</sup> We emphasize that the cable operator has discretion to decide whether to enter into a retransmission consent agreement, but in the absence of such an agreement, the Act and the Commission's rules prohibit retransmission of the station's signal. Although White Knight informed Bailey that its retransmission of WVLA-TV was a violation of federal law,<sup>26</sup> Bailey continued impermissibly retransmitting the station's signal from January 1, 2012 until February 3, 2012.

8. Based upon the evidence before us, and in view of the applicable law and Commission precedent, we find that Bailey apparently willfully and repeatedly violated Section 325 of the Act and Section 76.64 of the Commission's rules. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Commission's rules specify a base forfeiture amount of seven thousand five hundred dollars (\$7,500) for each violation of the cable broadcast carriage rules.<sup>27</sup> In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act and Section 1.80 of the Commission's rules,<sup>28</sup> which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>29</sup> The base forfeiture amount for the present matter would be calculated as follows:

$$\$7,500 \text{ base forfeiture} \times 34 \text{ days} = \$255,000 \text{ total base forfeiture}$$

During our investigation, Bailey submitted financial information which, after our review, establishes that a \$255,000 forfeiture would place the company in extreme financial hardship, and would represent a significant percentage of Bailey's gross revenues. Accordingly, we act within our discretion to reduce the proposed forfeiture. With regard to an individual's or entity's inability to pay the forfeiture, the Commission has determined that, in general, gross revenues are the best indicator of an inability to pay a forfeiture.<sup>30</sup> Having reviewed Bailey's submitted documentation (including gross revenue figures), and after applying the *Forfeiture Policy Statement*, Section 1.80 of the rules, and the statutory factors to the instant case, we conclude that Bailey is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000). We caution, however, that a party's inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.<sup>31</sup> We have previously rejected inability to pay claims in cases

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<sup>25</sup> See *id.*

<sup>26</sup> WVLA-TV Complaint at 3-4 and Ex. C.

<sup>27</sup> See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recons. denied* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"); 47 C.F.R. § 1.80(b).

<sup>28</sup> See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

<sup>29</sup> See *id.*

<sup>30</sup> See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 15 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues).

<sup>31</sup> See 47 U.S.C. § 503(b)(2)(E) (requiring Commission to take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require).

of repeated or otherwise egregious violations.<sup>32</sup> Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Bailey's financial circumstances.

#### IV. ORDERING CLAUSES

9. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,<sup>33</sup> and Sections 0.61, 0.283, and 1.80 of the Commission's rules,<sup>34</sup> that Bailey Cable TV, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for apparently willfully and repeatedly violating Section 325 of the Communications Act of 1934, as amended, and Section 76.64 of the Commission's rules.

10. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, Bailey Cable TV, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture, including a detailed factual statement in support of its request for reduction or cancellation of the proposed forfeiture, and supported by pertinent documents and affidavits.

11. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL/Account* number and *FRN* referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, Missouri 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the *NAL/Account* number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for payment of the full amount under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov) with any questions regarding payment procedures. Bailey shall also send electronic notification on the date said payment is made to [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov).

12. The response, if any, must be mailed to Diana Sokolow, Policy Division, Media Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554, and **SHALL INCLUDE** the *NAL/Acct.* number referenced above. In addition, to the extent practicable, a copy of the response, if any, should also be transmitted via e-mail to [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov).

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<sup>32</sup> *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur., Western Region 2011) (holding that violator's repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay); *Hodson Broadcasting Corp.*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee's continued operation at variance with its construction permit constituted an intentional and continuous violation, which outweighed permittee's evidence concerning its ability to pay the proposed forfeitures).

<sup>33</sup> See 47 U.S.C. § 503(b).

<sup>34</sup> See 47 C.F.R. §§ 0.61, 0.283, and 1.80.

13. **IT IS FURTHER ORDERED** that the complaint in this proceeding **IS GRANTED** to the extent indicated herein, and the complaint proceeding **IS HEREBY TERMINATED**.<sup>35</sup>

14. **IT IS FURTHER ORDERED** that a copy of this *NAL* shall be sent, by First Class Mail and Certified Mail-Return Receipt Requested, to David A. Bailey, Bailey Cable TV, Inc., 807 Church Street, Port Gibson, MS 39150.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief  
Media Bureau

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<sup>35</sup> For purposes of the forfeiture proceeding initiated by this *NAL*, Bailey Cable TV, Inc. shall be the only party to this proceeding.

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Bailey Cable TV, Inc.	)	MB Docket No. 12-34
	)	CSR No. 8584-C
	)	NAL/Acct. No.: MB-201241410023
	)	FRN: 0011409034

**NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: March 16, 2012

Released: March 16, 2012

By the Chief, Media Bureau:

**I. INTRODUCTION**

1. In this Notice of Apparent Liability For Forfeiture (“NAL”), we find that Bailey Cable TV, Inc. (“Bailey”) apparently willfully and repeatedly violated Section 325 of the Communications Act of 1934, as amended (the “Act”), and Section 76.64 of the Commission’s rules, by retransmitting the signal of a broadcasting station without “the express authority” of the originating station.<sup>1</sup> Based upon our review of the facts, we find Bailey apparently liable for a monetary forfeiture in the amount of fifteen thousand dollars (\$15,000).

**II. BACKGROUND**

2. Communications Corporation of America (“ComCorp”) is the parent company of the licensee of full-power television station WGMB-TV, Baton Rouge, Louisiana. ComCorp filed a complaint with the Commission, alleging that Bailey retransmitted without consent the signal of WGMB-TV on its cable system serving St. Francisville, Louisiana; Angola, Louisiana; and certain unincorporated areas within West Feliciana Parish, Louisiana (the “Communities”).<sup>2</sup>

3. Bailey’s cable system serving the Communities is a multichannel video programming distributor (“MVPD”), and WGMB-TV is a broadcasting station within the Baton Rouge Designated Market Area (“DMA”) served by Bailey.<sup>3</sup> For the 2012-2014 carriage cycle, for the Bailey cable system serving the Communities, ComCorp elected retransmission consent for WGMB-TV.<sup>4</sup> Although Bailey’s retransmission consent agreement with ComCorp expired on December 31, 2011, Bailey continued

<sup>1</sup> 47 U.S.C. § 325(b)(1)(A); 47 C.F.R. § 76.64(a).

<sup>2</sup> See Enforcement Complaint Concerning WGMB-TV, Baton Rouge, Louisiana (dated Jan. 23, 2012) (“WGMB-TV Complaint”). Concurrently with this NAL, we are issuing a Notice of Apparent Liability For Forfeiture pertaining to a similar complaint filed by Knight Broadcasting of Baton Rouge License Corp. (“White Knight”), the licensee of full-power television station WVLA-TV, Baton Rouge, Louisiana, against Bailey. See Enforcement Complaint Concerning WVLA-TV, Baton Rouge, Louisiana (dated Jan. 25, 2012) (“WVLA-TV Complaint”). Bailey was formerly known as Audubon Cablevision. See WVLA-TV Complaint at 1.

<sup>3</sup> WGMB-TV Complaint at 2.

<sup>4</sup> *Id.* at 2-3 and Ex. A.

carrying WGMB-TV despite the absence of an extension or renewal agreement.<sup>5</sup> ComCorp informed Bailey, both before and after the expiration of the retransmission consent agreement, that Bailey was not permitted to retransmit WGMB-TV once the agreement expired.<sup>6</sup> ComCorp seeks an order directing Bailey to comply with the law and imposing appropriate sanctions for its knowing, deliberate, and continuing violations.<sup>7</sup>

4. In response, Bailey does not refute that it retransmitted WGMB-TV without express, written consent.<sup>8</sup> Rather, Bailey argues that it faced a “dramatic increase” in requested retransmission consent fees, and states that it receives the signal by antenna rather than satellite or the Internet.<sup>9</sup> Bailey claims that ComCorp is “using [the Commission] as a tool to negotiate a dramatic increase in rates” and it requests that the Commission require the fair negotiation of a reasonable rate.<sup>10</sup> On February 3, 2012, following a telephone conference with Commission staff and the parties, Bailey and ComCorp executed an agreement extending the term of their retransmission consent agreement.<sup>11</sup>

### III. DISCUSSION

5. As described below, we conclude that Bailey is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000) for its apparent willful and repeated retransmission of WGMB-TV’s signal without the express authority of the originating station. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.<sup>12</sup> Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the

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<sup>5</sup> *Id.* at 3. ComCorp claims that it “made every effort to extend the Agreement with Bailey, but Bailey refused to engage in serious negotiations.” *Id.*

<sup>6</sup> *Id.* at 3-4. ComCorp alleges that its designated negotiator contacted Bailey on December 30, 2011, “and advised it that at midnight on December 31, 2011, the Agreement would expire and Bailey would no longer have authority to retransmit the programming for WGMB-TV.” *Id.* at 3. On January 3, 2012, ComCorp faxed and e-mailed Bailey a letter stating that its continuing carriage of WGMB-TV was in violation of federal law. *Id.* at 4 and Ex. C.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> Bailey Cable TV, Inc. Answer to Enforcement Complaint Concerning WVLA-TV, Baton Rouge, Louisiana (dated Jan. 30, 2012) (“Bailey Answer”). Bailey informed the Commission that it did not intend to file a separate answer to the WGMB-TV Complaint, and that the same arguments would apply. During a telephone conference with Commission staff, ComCorp and White Knight on February 3, 2012, Bailey made the same arguments with regard to both stations. Accordingly, we will treat the Bailey Answer as pertaining to the WGMB-TV Complaint as well as the WVLA-TV Complaint, for purposes of this *NAL*.

<sup>9</sup> *Id.* at 1. Bailey also claims that it erroneously received a contract for the Hartford-New Haven area that covered all broadcast networks. *See id.* at 1 and Ex. A. Given that the contract clearly labeled two fictitious stations in the Hartford-New Haven DMA as examples, this argument fails. *See id.* at Ex. A.

<sup>10</sup> *See id.* at 1.

<sup>11</sup> *See* Letter from John R. Feore, Jr. and Robert J. Folliard, III, Counsel to Communications Corporation of America, to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau, at 1 (Feb. 28, 2012). Bailey erroneously indicated that the date of the telephone conference was February 2, 2012. *See* Letter from David A. Bailey, Bailey Cable TV, Inc., to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau (Feb. 27, 2012).

<sup>12</sup> *See* 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

law.<sup>13</sup> The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,<sup>14</sup> and the Commission has so interpreted the term in the Section 503(b) context.<sup>15</sup> The Commission may also assess a forfeiture for violations that are merely repeated and not willful.<sup>16</sup> "Repeated" means that the act was committed or omitted more than once or lasts more than one day.<sup>17</sup> In order to impose a forfeiture, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed or why it should be reduced and must include a detailed factual statement and pertinent documents and affidavits as support.<sup>18</sup> The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.<sup>19</sup>

6. Section 325 of the Act requires cable systems and other MVPDs to obtain "the express authority of the originating station" to retransmit a broadcasting station's signal.<sup>20</sup> This requirement is codified in Section 76.64 of the Commission's rules, which further requires retransmission consent agreements to be in writing and to "specify the extent of the consent being granted."<sup>21</sup> The Commission previously stated that if an MVPD retransmits a television signal without consent, Commission intervention would be consistent with precedent and "properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture."<sup>22</sup>

7. We find that Bailey apparently violated Section 325 of the Act and Section 76.64 of the Commission's rules by retransmitting WGMB-TV's signal without the required consent. Bailey does not dispute ComCorp's allegations that it retransmitted WGMB-TV's signal despite the expiration of the retransmission consent agreement and the failure to enter into an extension or renewal agreement.<sup>23</sup> Bailey objects to the increase in the retransmission consent fees requested by ComCorp,<sup>24</sup> but such an increase does not justify an MVPD's retransmission of a broadcasting station's signal without the originating station's express authority. We also find irrelevant to this matter Bailey's statement that it

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<sup>13</sup> 47 U.S.C. § 312(f)(1).

<sup>14</sup> See H.R. Rep. No. 97-765, 97<sup>th</sup> Cong. 2d Sess. 51 (1982).

<sup>15</sup> See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

<sup>16</sup> See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) ("*Callais Cablevision, Inc.*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

<sup>17</sup> *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

<sup>18</sup> See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

<sup>19</sup> See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

<sup>20</sup> 47 U.S.C. § 325(b)(1)(A). Although there are certain exceptions to this requirement, including for local commercial stations that have elected to assert their mandatory carriage rights, no exceptions apply to the present situation. See WGMB-TV Complaint at 2 n. 1; 47 U.S.C. §§ 325(b)(1)(B), 534(b).

<sup>21</sup> 47 C.F.R. § 76.64(a), (j).

<sup>22</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3005, ¶ 175 (1993).

<sup>23</sup> Bailey Answer.

<sup>24</sup> See *id.* at 1.

receives the signal “free over the air to antenna receivers.”<sup>25</sup> We emphasize that the cable operator has discretion to decide whether to enter into a retransmission consent agreement, but in the absence of such an agreement, the Act and the Commission’s rules prohibit retransmission of the station’s signal. Although ComCorp informed Bailey that its retransmission of WGMB-TV was a violation of federal law,<sup>26</sup> Bailey continued impermissibly retransmitting the station’s signal from January 1, 2012 until February 3, 2012.

8. Based upon the evidence before us, and in view of the applicable law and Commission precedent, we find that Bailey apparently willfully and repeatedly violated Section 325 of the Act and Section 76.64 of the Commission’s rules. The Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Commission’s rules specify a base forfeiture amount of seven thousand five hundred dollars (\$7,500) for each violation of the cable broadcast carriage rules.<sup>27</sup> In assessing the monetary forfeiture amount, we must take into account the statutory factors set forth in Section 503(b)(2)(E) of the Act and Section 1.80 of the Commission’s rules,<sup>28</sup> which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.<sup>29</sup> The base forfeiture amount for the present matter would be calculated as follows:

\$7,500 base forfeiture x 34 days = \$255,000 total base forfeiture

During our investigation, Bailey submitted financial information which, after our review, establishes that a \$255,000 forfeiture would place the company in extreme financial hardship, and would represent a significant percentage of Bailey’s gross revenues. Accordingly, we act within our discretion to reduce the proposed forfeiture. With regard to an individual’s or entity’s inability to pay the forfeiture, the Commission has determined that, in general, gross revenues are the best indicator of an inability to pay a forfeiture.<sup>30</sup> Having reviewed Bailey’s submitted documentation (including gross revenue figures), and after applying the *Forfeiture Policy Statement*, Section 1.80 of the rules, and the statutory factors to the instant case, we conclude that Bailey is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000). We caution, however, that a party’s inability to pay is only one factor in our forfeiture calculation analysis, and is not dispositive.<sup>31</sup> We have previously rejected inability to pay claims in cases

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<sup>25</sup> See *id.*

<sup>26</sup> WGMB-TV Complaint at 3-4 and Ex. C.

<sup>27</sup> See *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997), *recons. denied* 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”); 47 C.F.R. § 1.80(b).

<sup>28</sup> See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(4).

<sup>29</sup> See *id.*

<sup>30</sup> See *PJB Communications of Virginia, Inc.*, Forfeiture Order, 7 FCC Rcd 2088, 2089 (1992) (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator’s gross revenues); *Local Long Distance, Inc.*, Forfeiture Order, 15 FCC Rcd 24385 (2000) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator’s gross revenues); *Hoosier Broadcasting Corporation*, Forfeiture Order, 15 FCC Rcd 8640 (2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator’s gross revenues).

<sup>31</sup> See 47 U.S.C. § 503(b)(2)(E) (requiring Commission to take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require).

of repeated or otherwise egregious violations.<sup>32</sup> Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Bailey's financial circumstances.

#### IV. ORDERING CLAUSES

9. **ACCORDINGLY, IT IS ORDERED**, pursuant to Section 503(b) of the Act,<sup>33</sup> and Sections 0.61, 0.283, and 1.80 of the Commission's rules,<sup>34</sup> that Bailey Cable TV, Inc. is hereby **NOTIFIED** of its **APPARENT LIABILITY FOR FORFEITURE** in the amount of fifteen thousand dollars (\$15,000) for apparently willfully and repeatedly violating Section 325 of the Communications Act of 1934, as amended, and Section 76.64 of the Commission's rules.

10. **IT IS FURTHER ORDERED**, pursuant to Section 1.80 of the Commission's rules, that within thirty (30) days of the release of this *NAL*, Bailey Cable TV, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture, including a detailed factual statement in support of its request for reduction or cancellation of the proposed forfeiture, and supported by pertinent documents and affidavits.

11. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Account number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, Missouri 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for payment of the full amount under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: [ARINQUIRIES@fcc.gov](mailto:ARINQUIRIES@fcc.gov) with any questions regarding payment procedures. Bailey shall also send electronic notification on the date said payment is made to [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov).

12. The response, if any, must be mailed to Diana Sokolow, Policy Division, Media Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554, and **SHALL INCLUDE** the *NAL*/Acct. number referenced above. In addition, to the extent practicable, a copy of the response, if any, should also be transmitted via e-mail to [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov).

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<sup>32</sup> *Kevin W. Bondy*, Forfeiture Order, 26 FCC Rcd 7840 (Enf. Bur., Western Region 2011) (holding that violator's repeated acts of malicious and intentional interference outweigh evidence concerning his ability to pay); *Hodson Broadcasting Corp.*, Forfeiture Order, 24 FCC Rcd 13699 (Enf. Bur. 2009) (holding that permittee's continued operation at variance with its construction permit constituted an intentional and continuous violation, which outweighed permittee's evidence concerning its ability to pay the proposed forfeitures).

<sup>33</sup> See 47 U.S.C. § 503(b).

<sup>34</sup> See 47 C.F.R. §§ 0.61, 0.283, and 1.80.

13. **IT IS FURTHER ORDERED** that the complaint in this proceeding **IS GRANTED** to the extent indicated herein, and the complaint proceeding **IS HEREBY TERMINATED**.<sup>35</sup>

14. **IT IS FURTHER ORDERED** that a copy of this *NAL* shall be sent, by First Class Mail and Certified Mail-Return Receipt Requested, to David A. Bailey, Bailey Cable TV, Inc., 807 Church Street, Port Gibson, MS 39150.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief  
Media Bureau

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<sup>35</sup> For purposes of the forfeiture proceeding initiated by this *NAL*, Bailey Cable TV, Inc. shall be the only party to this proceeding.

## CERTIFICATE OF SERVICE

I certify that on this 12th day of April, 2012, I caused the foregoing Retransmission Consent Complaint and Petition for Order Requiring TV Max, Inc. to Show Cause Why It Should Not Cease and Desist From Violating Section 325(b) of the Communications Act to be served by first-class mail, except where email is indicated, on the following:

William T. Lake\*  
Chief, Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

P. Michele Ellison\*  
Chief, Enforcement Bureau  
Federal Communications Commission  
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Michelle Carey\*  
Deputy Chief, Media Bureau  
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TV Max, Inc.  
d/b/a Wavevision  
10300 Westoffice Drive, Suite 200  
Houston, TX 77042

\* via email

  
Tracey Combs